

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
PETITION FOR
REHEARING**

75-7308

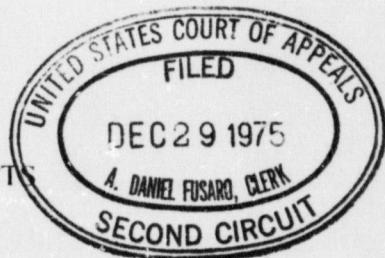
In The
United States Court of Appeals
For The Second Circuit

L. BATLIN & SON, INC.,

Plaintiff-Appellee.

vs.

JEFFREY SNYDER, d/b/a J.S.N.Y. and ETNA PRODUCTS
CO., INC.,



Defendants-Appellants.

**BRIEF ON REHEARING FOR
DEFENDANTS-APPELLANTS**

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-----X
L. BATLIN & SON, INC., :
Plaintiff-Appellee, : Appeal No. 75-7308
v. : Appeal in 75 Civ. 2036
JEFFREY SNYDER, d/b/a J.S.N.Y. and :
ETNA PRODUCTS CO., INC., :
Defendant-Appellants.
:-----X

BRIEF ON REHEARING FOR DEFENDANT-APPELLANTS

Statement of the Case

This is a Rehearing of a Decision by the United States Court of Appeals for the Second Circuit (Hon. Thomas J. Meskill and Ellsworth Van Graafeiland, with a Dissent by Hon. James L. Oakes, decided October 24, 1975). This Court's Decision reversed an earlier Decision (A-114)* and Preliminary Injunction (A-119) issued by the District Court for the Southern District of New York (Hon. Charles M. Metzner, D.J. - May 15, 1975). The Preliminary Injunction mandated that defendants Snyder and Etna Products Co., Inc. (hereinafter, collectively, "Snyder") be enjoined pendente lite, "from asserting...any alleged rights in..." the copyright here in issue (A-17), and affirmatively

*Joint Appendix references will be identified "A-" herein.

compelled Snyder to cancel "the recordation...[of the copyright registration] with the United States Customs Service".

The Court of Appeals concluded its Opinion by noting that the District Court had based the grant of a Preliminary Injunction upon a finding that the Snyder bank is probably not copyrightable. Because the Court of Appeals differed, it vacated the Preliminary Injunction.

In issue is a copyright on a plastic "Uncle Sam" bank designed, sketched, sculpted and molded on commission for Snyder and inspired by a metal Uncle Sam bank which had long been in the public domain.

This action was initiated by plaintiff-appellee L. Batlin & Son, Inc. (hereinafter "Batlin") in an effort to obtain a Declaratory Judgment of the invalidity and unenforceability of defendant Snyder's copyright (A-3).

Prior thereto Snyder had registered his version of the Uncle Sam bank by deposit with the Register of Copyrights (A-17) and had sought to protect his version of the Uncle Sam bank by filing a copyright infringement action against E. Mishan & Sons, Inc. in the District Court for the Southern District of New York (75 Civ. 428). In that case, Judge Metaner denied Snyder's Motion for a Preliminary Injunction (A-122) asserting that:

"There is no original idea here...
This idea is clearly in the public domain
and is the same creative idea that exists
in the antique banks." [Emphasis supplied]
(A-126-27).

In early February, 1975, Snyder initiated administrative proceedings to record the Uncle Sam bank copyright registration with the United States Customs Service to bar importation of infringing plastic Uncle Sam banks in accordance with the provisions of 17 U.S.C., Sec. 106, 108, 109. An Order precluding such importations was promulgated by the Customs Service in April, 1975.

On May 2, 1975 Judge Metzner issued a Temporary Restraining Order to restrain the Customs Service and Snyder from enforcing the importation exclusion Order, pending determination of Batlin's Motion for Preliminary Injunction (A-19). After a hearing on May 6, 1975 (A-48), Judge Metzner granted the Preliminary Injunction, stating in his Opinion of May 12, 1975 (A-114) that:

"I find little probability that defendants' copyright will be found valid in a trial on the merits." (A-116)

On May 15, 1975 the District Court entered the above described Order and Preliminary Injunction. Snyder appealed from that Order (A-119).

The Court of Appeals, as noted in its Majority Opinion, found that the Snyder Uncle Sam bank was copyrightable, although it said that the issue of infringement was as yet undetermined. Batlin then moved for a Rehearing En Banc of the Court of Appeal's Decision.

The Facts

Cast metal savings banks incorporating an Uncle Sam figure standing atop a decorated, box-like platform have long been in the public domain. The design of such an article was found sufficiently novel by the U.S. Patent Office to be the subject of U.S. Design Patent No. 16,728 granted on June 8, 1886 (A-14). A typical example of the prior metal Uncle Sam bank is in evidence in this proceeding as Exhibit 1.

Etna Products Co., Inc. is engaged in the business of importing and selling novelty items such as the Uncle Sam bank (Snyder Affidavit, A-36, para. 4), and Jeffrey Snyder is an officer of Etna (A-36, para. 2) and commissions the design and sculpting of novelty items which Etna thereafter markets (A-37, para. 5). In January, 1974, Jeffrey Snyder saw one version of the metal Uncle Sam bank and, as the item appeared quite timely for marketing in connection with the U.S. Bicentennial, Snyder purchased it (A-37, para. 7).

In April, 1974, while Jeffrey Snyder was in Hong Kong, he asked his Hong Kong buying agent whether it could design and produce a new plastic Uncle Sam bank for him, inspired by the metal bank (A-37, para. 9). A high quality designer and mold maker in Hong Kong was selected by the buying agent (A-37, para. 9). Sketches were made during a conference between Jeffrey Snyder, his buying agent and the designer of a proposed reduced size plastic Uncle Sam bank,

based on the antique metal Uncle Sam bank (which was 11 inches high) (A-38, paras. 8-12). A 10 inch high clay model of the proposed article was thereafter sculpted (A-38, para. 13). During a later meeting, Jeffrey Snyder, the buying agent and the mold maker decided to further modify the design and to further reduce the height of the model to 9 inches (A-38, 39, para. 13). A 9 inch tall prototype was accordingly sculpted (A-39, paras. 14-15). After Jeffrey Snyder approved the prototype, its design was utilized for preparation of the mold employed in the production of Snyder's copyrighted, commercial work (A-39, para. 15). An example of the copyrighted plastic bank is in evidence as Exhibit 2 herein.

Both Batlin's expert witness, Bloch (at A-65, li. 5 - A-66, li. 8) and Snyder's expert witness, Wurmbrand (at A-93-95 - A-103, li. 22 - A-104, li. 11) testified that the sculpting steps were necessary to produce Snyder's plastic bank and that a trained artist and sculptor had to have spent considerable time in designing and sculpting Snyder's bank*.

* Wurmbrand Testimony, A-104, li. 3-11:

"Q Would you say that it took him hours of work in front of the original to produce the copy? What would you estimate as to how long it would take you?

A It depends on the artist.

Q How long would it take you to do that?

A About a day and a half, two days work.

Q How would you rate that -- would that be an easier piece than you worked on or a more difficult piece?

A I would put it in between medium and difficult."

Because of the several design and sculpting stages through which Snyder's bank passed between the initial cast metal Uncle Sam bank and the final plastic version, because it was an artist or sculptor who performed the various stages in the creative process and his individual artistic judgments went into his contribution and in view of Snyder's desire to create a "good looking Uncle Sam bank", and most important, because a new work was being created, numerous changes in the shape and appearance of the plastic Uncle Sam bank, as compared with the previous metal bank (A-40-41, para. 20), necessarily resulted. (Snyder's bank was not created with the intent of making "differences" between the Snyder and public domain banks. Because a new work was created, during the process of creation, the differences inevitably arose)

The differences between the Snyder plastic Uncle Sam bank and the prior cast metal bank have been documented both in the Snyder Affidavit and by the testimony of both Batlin's and Snyder's expert witnesses during the May 6, 1975 evidentiary hearing (A-48). Thus, it is uncontroverted on the present record that the Snyder plastic Uncle Sam bank differs from the prior, public domain, metal Uncle Sam bank in at least the following respects:

- (1) The Snyder plastic Uncle Sam bank is nine inches in height, whereas the prior metal Uncle Sam bank is 11 inches high, with many other differences in the dimensions of the respective Uncle Sam figures, the supporting

pedestals, and the carpet bags or satchels mounted thereon;¹

(2) The shape and surface textures of the respective satchels differ from one another;²

(3) The eagle figures on the front of the respective platforms of the Uncle Sam banks differ both in surface textures and in that the eagle on the metal bank holds arrows in its talons whereas the eagle on the plastic bank is perched on a branch, holding leaves;³

(4) The shape and appearance of the faces of the respective Uncle Sam figures differ⁴, as does the shape of the ears⁵ and hair styles⁶;

(5) The appearance of the clothing on the respective Uncle Sam figures differ, in particular with respect to the shape and textures of their hats, the shape and decorations on their bow ties⁸, the shapes and folds of their shirt collars⁹, the openings

1 Snyder Affidavit; A-40, para. 20

2 Snyder Affidavit; A-40, para. 20; (plaintiff's) Bloch, A-55 li. 21 - A-56, li. 10; (defendants') Wurmbrand, A-95, li. 15-18.

3 Snyder, A-40, para. 20; Bloch, A-70, li. 3 - A-71, li. 5.

4 Snyder, A-40, para. 20; Wurmbrand, A-97, li. 21-23.

5 Wurmbrand, A-96, li. 8-10.

6 Snyder, A-40, para. 20; Wurmbrand, A-96, li. 11-18.

7 Snyder, A-40, para. 20.

8 Snyder, A-40, para. 20.

9 Snyder, A-40, para. 20.

in their coats¹, and the lengths and separation or joinder of their pants cuffs²;

(6) The overall anatomical shapes of the respective figures differ, for example, with respect to the proportions of their stomachs and abdomens³, the delineation of their knees⁴, and fingers⁵, and the shapes of the left arms thereof⁶; and

(7) The mold parting or separating lines of the respective figures differ in location⁷.

These design differences were developed during the several steps from the antique metal Uncle Sam bank to the sketches thereof, from the sketches to the first reduced size clay model, and from the first reduced size clay model to the prototype for the copyrighted work, and were due to the aesthetic contributions of the artists and sculptors involved.

The Snyder plastic Uncle Sam bank is produced in Hong Kong and bears the copyright notice "© J.S.N.Y.". Snyder's records indicate that the copyrighted work was first published in this country on October 15, 1974 (A-42, para. 24). The acts of copyright infringement in issue in this and the related Mishan proceedings quickly followed.

1 Bloch, A-68, li. 23 - A-69, li. 16; Wurmbrand A-97, li. 2.
2 Bloch, A-72, li. 5 - A-73, li. 12; Wurmbrand A-97, li. 9-19.
3 Wurmbrand, A-97, li. 24 - A-98, li. 7.
4 Bloch, A-74, li. 18 - A-75, li. 4.
5 Bloch, A-77, li. 17 - A-78, li. 4.
6 Snyder, A-40, para. 20.
7 Bloch, A-78, li. 14 - A-81, li. 17, Wurmbrand A-98, li. 8-23.

The Issue on Rehearing

The issue before this Court is whether the Court of Appeals was correct in reversing the Decision of the District Court and finding that the Preliminary Injunction issued by the District Court was not warranted under the present circumstances. In deciding this question, this Court must decide whether a plastic bank, whose design was inspired by a work in the public domain, and which plastic bank was designed through a process comprising sketches, to clay model, to revised prototype to final version and which plastic bank had to be and, in fact, was created by a skilled artist-designer-sculptor over a period of days and which, due to the independent creation thereof, has numerous differences from its public domain inspiration, has sufficient "originality" to be copyrightable.

Argument

I. The Court of Appeals by its Majority Opinion Correctly Set the Facts of this Case in Perspective to the History and Purposes of the Copyright Laws

The copyright in issue in this case was registered pursuant to 17 U.S.C., Sec. 5. Congress enacted that Statute pursuant to the purpose set forth in Article I, Section 8 of the Constitution:

"To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Thus, as noted by this Court in Alfred Bell & Co., v. Catalda Fine Arts, 191 F.2d 99, 100 (2nd Cir. 1951) "...the very language of the Constitution differentiates (a) 'authors' and their 'writings' from (b) 'inventors' and their 'discoveries'." This Court in Alfred Bell & Co. v. Catalda Fine Arts quoted with approval the following statement from Henderson v. Tompkins, 60 Fed. 758, 764 (D. Mass. 1894):

"There is a very broad distinction between what is implied in the word 'author', found in the constitution, and the word 'inventor.' The latter carries an implication which excludes the results of only ordinary skill, while nothing of this is necessarily involved in the former."

This Court in Alfred Bell & Co., supra, further distinguished between the limits of protection accorded a copyright owner as opposed to the protection granted a patent owner stating, 191 F.2d, at 103:

"Correlative with the greater immunity of a patentee is the doctrine of anticipation which does not apply to copyrights: The alleged inventor is chargeable with full knowledge of all the prior art, although in fact he may be utterly ignorant of it. The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his."

The concept of originality within the context of the Copyright Laws stems from and is equivalent to "authorship" unlike the Patent Laws where originality is related to "inventorship".

Alfred Bell & Co. v. Catalda Fine Arts, supra. When used in connection with patents or inventions, the term "original" is wrapped in a framework of novelty, creativity, discovery, and in general, some measure of departure from that which was known before and which is not obvious. The concept of originality within the framework of the Copyright Laws is concerned with the author or source of the work and not with its novelty.

In Baker v. Selden, 101 U.S. 99 (1879) for example, the Court stated at p. 102:

"The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government."

Judge Hand also quoted with approval from Chautauqua School v. National School, 238 Fed. 151, (2 Cir. 1916) at page 151:

"Works alike may be original. It is not essential that any production, to be original or new within the meaning of the law of copyright, shall be different from another. Whether the composition for which copyright is claimed is the same as or different from, or whether it is like or unlike, an existing one, are matters of which the law takes no cognizance,

except to determine whether the production is the result of independent labor or of copying. Two or more authors may write on the same subject, treat it similarly, and use the same common materials in like manner or for one purpose. Their productions may contain the same thoughts, sentiments, ideas; they may be identical. Such resemblance or identity is material only as showing whether there has been unlawful copying. In many cases the natural or necessary resemblance between two productions which are the result of independent labor will amount to substantial identity. * * * But, notwithstanding their likeness to one another, any number of productions of the same kind may be original within the meaning of the law, and no conditions as to originality are imposed upon the makers, except that each shall be the producer of that for which he claims protection."

Whereas the inventor is obligated to make a discovery and hence depart from that which is known, there is no such requirement for an author. His obligation is not with discovering something previously unknown, but rather with the expression in some form of an idea be it known or unknown.

Mazer v. Stein et al, 347 U.S. 201 (1954). The Supreme Court in Mazer v. Stein cites with approval Fred Fisher, Inc. v. Dillingham, 298 Fed. 145, 151 (S.D.N.Y. 1924), wherein the Court notes the right of each of two men who made identical maps of the same territory to obtain a copyright on his particular map. Thus, each map is "original" to its particular author although the maps are otherwise indistinguishable. A copyrighted work must be original to the author in the sense

that it flowed from his own independent handiwork, as opposed to being original with the world at large in the sense of contributing something not previously known or "novel". Thus, in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1911), Justice Holmes, writing on behalf of the Court, observed that a copyright does not prohibit another author from making a separate copy of the original, and two copies of the original may coexist. 188 U.S., at p. 249. The fact that the second copy is virtually identical to the first copy is irrelevant as long as it expresses the personal reaction of the second author to the original:

"The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." (188 U.S., at p. 250)

It is worth noting at this juncture that there is good reason behind the grant of a copyright for the independent work of an author, stemming from the objectives of the Copyright Laws. It is all too often forgotten that Copyright Law exists primarily for the benefit of the public and its objective is to foster the growth of learning and culture for the public welfare. The public also stands to benefit from a lack of confusion as to who to hold accountable, as well as who to recognize for a given work. The objectives are stated more fully in the legislative report (H. Rept. No. 2222, 60th Cong., 2d sess.) on the Copyright Act of 1909:

"The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors." (Quoted in II Studies on Copyright, (Bobbs-Merrill Co., 1963) p. 1205).

In The Federalist, No. 43, at 278 (Modern Library Ed. 1937) Madison wrote:

"The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals."

Consistent with the above objective, the Courts have always found sufficient basis for copyrightability in virtually any work created by an author's own skill, labor and judgment. See Goldstein v. California, 412 U.S. 546, 561, 93 S.Ct. 2303, 2312 (1973). Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872, 873 (10 Cir. 1938). For example, in Doran v. Sunset House Distributing Corp., 197 F. Supp. 940

(S.D. Cal. 1961), affd., 304 F.2d 251 (9 Cir. 1962), the Court recognized copyrightability in Doran's reproduction of Santa Claus in plastic. Similarly, models of real show dogs, in plaster and porcelain, were recognized to be copyrightable in Contemporary Arts, Inc. v. F.W. Woolworth Co., 93 F. Supp. 739 (D. Mass. 1950). In Imperial Homes Corporation v. Lamont, 458 F.2d 895 (5 Cir. 1972), the Court dealt with architectural drawings for a residence, which drawings were reproduced from a copyrighted set of architectural drawings in a builder's advertising brochure. In upholding the enforceability of the copyrighted drawings, the Court said:

"In Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58, 4 S.Ct. 279, 28 L.Ed. 348 (1884) 'an author' was defined as 'he to whom anything owes its origin; originator, maker; one who completes a work of science or literature.' Hence, the architect who originates a set of blueprints for a dwelling is as much an author for copyright purposes as the writer who creates an original novel or the dramatist who pens a new play. This authorship concept is no more than one facet of the essence of that which merits copyright protection - originality. However, while such originality is the test for copyrightability, it does not extend so far as to require that novelty or invention, which is the sine qua non for patent protection be present."

In Pantone, Inc. v. Friedman, Inc., 294 F. Supp. 545 (S.D.N.Y. 1968), the Court upheld the copyrightability of a booklet of a color matching system. In doing so, the

Court once more recognized that the novelty or lack of novelty of a particular work was irrelevant to the determination of its copyrightability:

"The foregoing principles have been repeatedly affirmed in decisions holding that the test for determining copyrightability is originality (i.e., independent creation or individuality of expression, rather than novelty, and that originality of even the slightest degree, even if it amounts to no more than a re-arrangement of age-old ideas, is sufficient."
(294 F. Supp., at p. 548)

Similarly, in Peter Pan Fabrics, Inc. v. Dan River Mills, Inc., 295 F. Supp. 1366 (S.D.N.Y. 1969); affd., 415 F.2d 1007 (2 Cir. 1969), the District Court noted, with respect to a copy of a flower pattern in the public domain, that:

"Even if nothing were added and the reproduction were an exact copy of the design, still the design or an exact copy of it could have been copyrighted as a work of art." [295 F. Supp. at 1367; emphasis supplied]

To the same effect are Peter Pan Fabrics Inc. v. Dixon Textile Corp., 280 F.2d 800, 802 (2 Cir. 1960), wherein a copyright on a design incorporating ancient Byzantine public domain designs was held valid; Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150, 1153-54 (N.D. Ill. 1972), wherein a copyright on statuary which closely reproduced pictures in a publication was held valid; Allegrini v. De Angelis, 59 F. Supp. 248, 250 (E.D. Pa. 1944); affd., 149 F.2d 815 (3 Cir. 1945), wherein a copyright on a precise, somewhat smaller copy of a religious

shrine which was in the public domain was held valid; Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284, 286-87 (6 Cir. 1971), wherein copyrights on precise models of large military airplanes were held valid; and Doran v. Sunset House Dist. Corp., 197 F. Supp. 940, 944 (S.D. Cal. 1961); affd., 304 F.2d 251 (9 Cir. 1962), wherein a copyright on a Santa Claus figure was held valid. In Doran, for example, the Court recognized that the copyrighted work incorporated the familiar public domain elements of the Santa Claus figure finding, nevertheless, that:

"here, plaintiffs first envisioned and then created by their own skill, labor and judgment, a Santa Claus in the form of a three-dimensional figure made of plastic. It is true, of course, that plaintiffs' Santa has all of the traditional features which go to make up Santa Claus, viz., the red suit and cap with white fur trim, the white hair and beard, the black belt and boots, the ruddy face and fat form. These features are part and parcel of the 'idea' of Santa Claus and hence are not copyrightable. However, the originality here lies in the form - three-dimensional - and the medium - plastic - which plaintiffs have used to express the idea of Santa Claus. As far as the record reveals, plaintiffs were the first to reproduce the traditional character in this particular form and medium." [197 F. Supp. at 944; emphasis supplied]

Further authorities noting the measure of originality warranting copyright protection are cited in the margin.*

Likewise, statuettes of elves were held to be copy-rightable by the Second Circuit Court of Appeals in Puddu v. Buonamici Statuary, Inc., 450 F.2d 401 (2 Cir. 1971).

The Court, in reversing Judge Tyler, observed:

"Judge Tyler dismissed the Complaints on two independent grounds. He considered that the copyrighted statuettes were not sufficiently different from a 1963 uncop-y-righted line as to possess the originality required for a copyright...." [450 F.2d, at 402].

*Dan Kasoff, Inc. v. Novelty Jewelry Co., 309 F.2d 745, 746 (2 Cir. 1952); Millworth Conv. Corp. v. Slifka, 276 F.2d 443 (2 Cir. 1960); Rushton v. Vitale, 218 F.2d 434, 435 (2 Cir. 1955); Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (5 Cir. 1972); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9 Cir. 1970); Best Medium Publ. Co. v. National Insider Inc., 385 F.2d 384, 386 (7 Cir. 1967); Gelles-Widmer Co. v. Milton Bradley Co., 313 F.2d 143, 146-47 (7 Cir. 1963); Wihtol v. Wells, 231 F.2d 550, 553 (7 Cir. 1956); Concord Fabrics, Inc. v. Generation Mills, Inc., 169 USPQ 470 (S.D.N.Y. 1971); Covington Fabrics Corp. v. Artel Prod. Inc., 328 F. Supp. 202, 204 (S.D.N.Y. 1971); Prestige Floral v. California Artificial Flower Co., 201 F. Supp. 287 (S.D.N.Y. 1962); Royalty Designs, Inc. v. Thrifticheck Serv. Corp., 204 F. Supp. 702, 704 (S.D.N.Y. 1962); Peter Pan Fabrics Inc. v. Acadia Co., 173 F. Supp. 292, 299 (S.D.N.Y. 1959); Scarves by Vera, Inc. v. United Merchants, 1973 F. Supp. 625, 627 (S.D.N.Y. 1959); Trifari, Krussman & Fishel, Inc. v. Charel Co., 134 F. Supp. 551, 553 (S.D.N.Y. 1955); Ziegelheim v. Flohr, 119 F. Supp. 324, 327 (E.D.N.Y. 1954); Amplex Mfg. Co. v. A.B.C. Plastic Fabr., Inc., 184 F. Supp. 285, 287 (E.D. Pa. 1960); Trebonik v. Grossman Music Corp., 305 F. Supp. 339, 346 (N.D. Ohio, 1969); Blumcraft of Pittsburgh v. Newman Bros., Inc., 159 USPQ 166, 173 (S.D. Ohio 1968).

Judge Tyler's dismissal was based upon precisely the same type of preliminary holding made in the present case. But this Court overruled Judge Tyler, holding that:

"However, originality has been considered to mean 'only that the work owes its origin to the author, i.e. is independently created and not copied from other works.' [Citation deleted] Plaintiff's employee, Metcalf testified without contradiction that he had sculpted all the copyrighted statuettes 'from scratch'. While there is a strong family resemblance between the copyrighted and the uncopyrighted models, the differences suffice to satisfy the modest requirement of originality laid down by the Supreme Court in Bleistein v. Donaldson Lith. Co., 188 U.S. 239 (1903) and by this Court in Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2 Cir. 1951)...[450 F.2d at 402; Emphasis supplied]

Originality requires no more than the input of some effort, skill and judgment and the avoidance of slavish imitation and direct copying.

In Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), the famous Rodin sculpture "Hand of God" was reproduced precisely by the copyright proprietor on an approximate one-half scale. The names, dates, size differences and other factual features of the present case could be directly substituted for those in Alva Studios. To quote the Alva Court at 177 F. Supp., p. 265:

"It is hornbook that a new and original plan or combination of existing materials in the public domain is sufficiently original to come within the copyright protection [Citation]. However, to be entitled to copyright, the work must be original in the sense that the author

has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another [Citation]. The plaintiff has the burden of establishing these elements...

Plaintiff has sustained this burden. Its copyrighted work embodies and resulted from its skill and originality in producing an accurate scale reproduction of the original. In a work of sculpture, this reduction requires far more than an abridgement of a written classic; great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude.

It is undisputed that the original sculpture owned by the Carnegie Institute is 37 inches and that plaintiff's copyrighted work is 18 1/2 inches."

In the present case, there is a smaller size, substantially scale reproduction of an original metal bank. There are differences between the two banks, but those differences arose because of the number of artistic steps through which the work passed and because an artist, sculptor made a creative contribution thereto. Measured by the standards of any of these precedents, the Snyder Uncle Sam bank meets the test of originality.

The degree of changes made in the Snyder Uncle Sam bank from the original ninety year old antique metal bank, comprising the modifications in proportions, shape and appearance of the Uncle Sam figure, the adjacent satchel and the eagle decoration on the supporting pedestal (see pages 6-8, supra) are further evidence of the significant artistic

effort involved and of the authorship and originality of the Snyder work. Puddu v. Buonamici Statuary, Inc., 450 F.2d 401, 402 (2 Cir. 1971); Doran v. Sunset House Dist. Corp., 197 F. Supp. 940, 944 (S.D. Calif. 1961); affd., 304 F.2d 251 (9 Cir. 1962); Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959); Blazon, Inc. v. Deluxe Game Corp., 268 F. Supp. 416, 421-22 (S.D.N.Y. 1965).

Finally, Snyder's efforts in reproducing the antique metal Uncle Sam bank in esthetically pleasing form in a new material and on a reduced scale further demonstrate the originality of the copyrighted work. Alva Studios Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959); Doran v. Sur et Home Dist. Corp., 197 F. Supp. 940, 944 (S.D. Calif. 1961); affd., 304 F.2d 251 (9 Cir. 1962); Allegrini v. De Angelis, 59 F. Supp. 248, 250 (E.D. Pa. 1944); affd., 149 F.2d 815 (3 Cir. 1945); Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284, 286-88 (6 Cir. 1971).

For each of the preceding reasons it is submitted that, as a matter of law, the copyrighted work here in issue meets the test of originality.

That the original from which the copyrighted work was taken is in the public domain does not defeat its originality or copyrightability. In Blazon, Inc. v. Deluxe Game Corp., 268 F. Supp. 416, 421, 422 (S.D.N.Y. 1965), the Court stated:

"The fact that plaintiff took a matter admittedly in the public domain, (i.e. a horse) does not in and of itself preclude a finding of originality, since plaintiff may have added unique features to the horse, enlarged it and made it sufficiently dissimilar from defendant's horse as to render it copyrightable to plaintiff."

In Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), the Court held that a reproduction of Rodin's "Hand of God" in a smaller size was copyrightable. Although the original was well known and in the public domain, the Court observed:

"one work does not violate the copyright in another simply because there is similarity between the two, if the similarity between the two results from the fact that both deal with the same subject or have the same source."

Once more, the Court reflected the fact that the true criterion for originality was whether the work reflected the author's independent efforts and skill. How close his likeness bore to the original was simply not the consideration.

The same conclusion was reached in Axelbank v. Rony, 277 F.2d 314 (9 Cir. 1960) where documentary films which were in the public domain were reproduced in a different sequence together with a running commentary. The Court said:

"Of course, just because the source of the material is in the public domain does not void a copyright, but rather the protection is limited to the new and original contribution of the author." (429 F.2d, at p. 317)

The copyrightability of fabric patterns is quite pertinent to the case here.

This Court faced the issue of the right of copyright to protect fabric designs where the design itself was in the public domain in the case of Millworth Converting Corporation v. Slifka, 276 F.2d 443 (2 Cir. 1960). Millworth had seen the design embroidered on a dress which its stylist bought. Millworth's stylist had the embroidered design photographed. Its fabric printer worked from the photograph to produce an arrangement of colors which would help give the effect of embroidery, i.e., a three-dimensional effect to a flat surface. The design was used on dresses and Millworth's objective was simply to make the flat surface dresses look like the embroidered dresses that his stylist had seen. Thus, the case presented an outright admitted copying of a design which was in the public domain and a change made to the color arrangement for the purpose of making the dress resemble the original all the more closely. It will be noted that the facts in the instant case involve artistic sketching by an artist, rather than a photographing of the original bank, and then involve the various stages through which a new mold was cast from the sketches. Just as Millworth was working on a new medium, i.e. from an embroidered dress to a flat fabric which he wanted to give the effect of embroidery, Snyder went from a metallic medium to a plastic medium. The court in Millworth cited with approval Alfred Bell & Co. v. Catalda Fine Arts, inc., 191 F.2d 99 (2 Cir. 1951) noting that:

"The latter requirement (for originality to obtain a copyright) was satisfied 'in the case of a reproduction of a painting in the public domain, by 'a distinguishable variation'." (276 F.2d at 445)

The Millworth case is further worth noting for a finding that since the copyright protected only the authors' or originators' "expression", the defendants were free to generate their own copy of the basic design which was in the public domain.

Similarly, a fabric bearing a floral and leaf design was held copyrightable in Covington Fabrics Corp. v. Artell Products, Inc., 328 F. Supp. 202 (S.D.N.Y. 1971). In Scarves by Vera, Inc. v. United Merchants, 173 F. Supp. 625, 627 (S.D.N.Y. 1959) the Court noted:

"Obviously, fish, sailor suits and ice cream parlor trappings are in the public domain, but the plaintiff has contributed enough to qualify the designs as distinguishable variations."

The plaintiff, Scarves by Vera, Inc., had applied silk screen paintings of fish, sailor suits and ice cream parlors in the manufacture of ladies' blouses. Once more, the fact that the original design is in the public domain did not prohibit the grant of a copyright to an author's particular expression of that design.

In Peter Pan Fabrics, Inc. v. Dickson Textile Corporation, 280 F.2d 800 (2 Cir. 1960), Peter Pan Fabrics had engaged a designer from Paris to design from rough sketches furnished him - a design Byzantine in motif. The resulting

design was printed on goods which were sold to dress manufacturers. The Court observed:

"While the basis of the sketches appears to have been suggested by or perhaps taken faithfully from ancient art forms, their incorporation into a combined design by the Parisian designer is clearly sufficiently original to satisfy the originality requirement of the copyright law." (280 F.2d, at p. 802)

Surely, the work performed would not have been any less original had a Hong Kong designer been called upon to work from rough sketches that were perhaps taken faithfully from ancient art forms. Similarly, in Peter Pan Fabrics, Inc. v. Acadia Company, 173 F. Supp. 292 (S.D.N.Y. 1959) a copyright on a decision incorporating ancient Byzantine designs in the public domain was held valid.

The copyright laws do not, in the words of Judge Metzner, require Snyder to have an "original idea" for that would be a discovery - a notion taken from the objectives of our patent laws. For the purposes of a copyright it is literally true that the work must be Snyder's own "copy" or his personal expression of something. And, as is clear from the many cases cited herein, an author's reproduction or "copy" of even that which is in the public domain is copyrightable so long as it represents his personal expression, i.e. he is the originator. He may repaint the Mona Lisa, recompose Dardanella (Fred Fisher, Inc. v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924), resculpt Rodin's Hand of God (Alva Studios

v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), and so long as his version reflects his own work, his own skill, words and craftsmanship, and is distinguishable, it matters not that the "original idea" is old and in the public domain. That Snyder chose to sculpt a work in the public domain is an admitted fact. But, as this Court has noted in its Majority Opinion, that it was a sculpture starting from scratch, from drawings to clay models, from prototypes to plastic mold, only confirms that Snyder is its true "author" or originator. The plastic Uncle Sam bank on which the copyright is in question here undoubtedly reflects the personal skill, efforts and craftsmanship of Snyder and those whose artistic work he commissioned:

II. The Effort and Skill Involved in Making the Plastic Version of the Original Metal Bank Should Satisfy the Most Stringent of Tests as Set Forth in the Opinions of the Majority and Minority of the Court of Appeals.

Even a brief examination of the artistic and creative steps involved in the making of Snyder's plastic bank will show its originality and copyrightability.

The testimony of Snyder's expert, Wurmbrand, describes the design and creation process as follows:

"A I would have to make a drawing, and from there I have to go and sculpt a model, an exact model of whatever it is, reduced in size, and from there we are going to cast, decide on what process we are going to do in order to make a mold, either by pantographing or by casting it" (A-91, li. 5-15).

"Q Is there any way to make a reduced size of Plaintiff's Exhibit 1 without some sculpture operation being involved?

"A No.

It is of interest to observe the description of the effort and skill involved from the testimony of Batlin's expert, who would be expected to play down the many steps involved in the creation:

"Q I direct your attention to Plaintiff's Exhibit 1, the metal bank and ask you the steps that to your knowledge would have to go into going from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2 [the plastic bank]?

A [By Batlin's witness, Bloch] First of all, a drawing would have to be made.

Q A drawing would have to be made?
A Yes.

Q Who would make that drawing?
A A designer. (A-62, li. 12-20).

Q I'd have to make a drawing?
A Yes.

Q What would the next step be?
A A model is made.

Q How would that model be made?
A Sometimes it is carved. Sometimes it is molded in plastilene. Sometimes it is carved in plaster. Sometimes it is carved in wood.

Q And following that, now, from your knowledge of plastic molding, following the making of which it is either sculptured or carved, what is the next step?

A I'd say you have to make a model.

Q You have to make a model?
A Yes.

Q The sculping [sic] that you talked about was not the model?

A The sculpting?

Q You talked about a sculpture or plastic work that has to be made. Was that a model that you were referring to?

A Yes.

Q Following that sculptured model, what is the next step?

A Dies have to be made, molds.

Q Who would make the dies and molds?

A That is up to the die maker.

Q A mold maker would have to make them?

A A mold make or a die maker. It depends on what way you are working, in what dies you are working. (A-63, li. 19-25; A-64, li. 2-22)

Q If you were given Plaintiff's Exhibit 1 and asked to make Plaintiff's Exhibit 2 from that --

A How would I go about it?

Q We heard already how you would go about that. What I am asking you is whether an artist would be necessary, a sculpture [sic] or somebody with artistic ability would be needed to go from Plaintiff's Exhibit 1 to 2.

A A certain amount of ability. (A-65, li. 25; A-66, li. 2-8)"

The Snyder version of the Uncle Sam bank is different from the public domain work and clearly distinguishable. The series of distinguishable features are mentioned, ante pp.

6-8.

The multiple steps involved in the creation of the Snyder work from the original antique metal bank, involving the successive preparation of (1) sketches from the 11-inch high article (A-38, para. 12), (2) a first

reduced size clay model (10 inches in height) therefrom (A-38, para. 13), and (3) a yet further modified and reduced size (9 inches in height) prototype (A-38-39, paras. 13-15) from which the (4) mold for the copyrighted work was prepared (A-39, para. 15), clearly evince the exercise of sufficient effort, skill and judgment, i.e. authorship, as to meet the requirement of "originality". Not only has Snyder himself stated that these steps occurred, but expert witnesses, Mr. Bloch called by Batlin and Mr. Wurmbrand called by Snyder, indicated that these steps must have taken place (Bloch, A-62, li. 9-20; A-63, li. 19 - A-64, li. 22; Wurmbrand, A-91, li. 5-15; A-92, li. 20 - A-94, li. 12. Certainly, Snyder's efforts were significantly greater than the "slavish copying" which the copyright act does not reward.

Prestige Floral, S.A. v. Calif. Artificial Flower Co., 201 F. Supp. 287, 291 (S.D.N.Y. 1962); Contemporary Arts, Inc. v. F.W. Woolworth Co. 93 F. Supp. 739, 742 (D. Mass. 1950), affd., 193 F.2d 162 (1 Cir. 1951), affd. 344 U.S. 228, 73 S.Ct. 222 (1952).

Thus, the Snyder bank clearly reflects independent authorship and, therefore, is original. We have seen from the case law that a mere change in medium is not necessarily trivial nor is a mere change in size trivial. The Snyder bank cannot be said to represent a trivial variation if only because it incorporates a multitude of changes. Furthermore, as we have

seen from the many decisions above, the mere fact that Snyder was working from a bank that was in the public domain does not make his version or reproduction thereof uncopyrightable. There are more than sufficient elements to constitute a distinguishable variation from the original metal bank.

III. Snyder's Version of the Uncle Sam Bank May be Regarded, for Copyright Classification Purposes, as Either a Reproduction of a Work of Art or as a Work of Art

17 U.S.C., Sec. 5 defines the various classifications of works on which statutory copyright may be obtained:

"The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:...

"(g) Works of art; models or designs for works of art;

"(h) Reproductions of a work of art...

"The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title nor shall any error in classification invalidate or impair the copyright protection secured under this title."

A work of art is defined in 37 C.F.R., Sec. 202.10(a):

"(a)...This class includes...works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, as well as works belonging to the fine arts, such as paintings, drawings and sculpture."

A reproduction of a work of art is defined in 37 C.F.R., Sec. 202.11:

"This class includes published reproductions of existing works of art in the same or a different medium, such as a lithograph, photoengraving, etching or drawing of a painting, sculpture or other works of art."

The Snyder plastic Uncle Sam bank may be regarded as either a work of art or a reproduction of a work of art.

A reproduction of a work of art need only reflect "originality", "creativity" not being required. As stated in Nimmer on Copyright, Sec. 20.3, at page 95:

"Secondly, as noted above, a work of art must evince some creativity while a reproduction of a work of art need not contain any creativity other than that which is inherent in the underlying work of art of which it is a reproduction. That is, the contribution made by the copyright claimant of the reproduction need not constitute creativity, although it must constitute originality."

See also Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776, 782 (n.2) (S.D.N.Y. 1968).

On the other hand, a work of art must "embody some creative authorship in its delineation or form" [37 C.F.R., Sec. 202.10(b)] to warrant copyright protection. Otherwise, stated, a work of art

"must evidence a minimal element of creativity in order to command copyright protection... The creativity required to constitute a work of art may be of a most humble and minimal nature." (Nimmer on Copyright, Sec. 19.1, at page 85)

IV. The Snyder Uncle Sam Bank Meets the Further Test
of "Creativity" for a Copyrightable Work of Art

As extensively reviewed above, Snyder's Uncle Sam bank satisfies the minimal requirement of originality. To warrant copyright protection as a work of art, a work must additionally evidence some minimal element of creativity. The Courts should not, however, substitute their personal judgment as to the worth or creative value of a work of art for that of those versed in the field. As stated by Mr. Justice Holmes, in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903):

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves the final judges of the worth of ... [works copyrighted] outside of the narrowest and most obvious limits."

The creativity requirement was specifically considered by this Court in Thomas Wilson Co. v. Irving J. Dorfman Co., 433 F.2d 409, 411 (2 Cir. 1970); cert. den., 401 U.S. 977, wherein the Court said:

"Moreover, the required creativity for copyright is modest at best. It has been variously described as 'little more than a prohibition of actual copying' or something more than a 'merely trivial' variation, or 'enough' if it be the author's own, 'no matter how poor artistically' [Citations deleted].

"Plaintiff's pansy design was created by its own staff. The configuration of the design, including such details as petals and leaves, required an appreciable amount of creative skill and judgment."

Similarly, in Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 278, 281-82 (5 Cir. 1970); cert. den., 398 U.S. 928, the Court of Appeals for the Fifth Circuit overruled a District Court finding of lack of creativity - in issue was a simple filigree pattern which the District Court Judge had described as:

"4. The filigree pattern is formed entirely of intercepting straight lines and arc lines." [159 USPQ, at 363]

The Court of Appeals notes that a work of art must have some minimal degree of creativity but, citing the statement by Justice Holmes in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903), held the work to be creative.

See also Ted Arnold Ltd. v. Silvercraft Co., 259 F.Supp. 733 (S.D.N.Y. 1966), wherein a simulation and miniaturization of an old antique telephone was held to satisfy the creativity requirement under the copyright law.

In light of the preceding authorities, it is clear that the Snyder Uncle Sam bank meets the creativity requirement for works of art. Manifestly, the artistic effort involved in the successive designing and sculpturing operations which produced a work differing in many respects from the antique, public domain Uncle Sam bank amount to that minimal creativity required for a work of art.

Snyder's expert Wurmbrand testified in the Court below that artistic and creative skills were necessary to make any versions of the antique metal Uncle Sam bank in reduced

proportions (A-91-94). This is reviewed in Points I and II of this Brief, ante pp. 9 et seq.

Snyder does not now and never has denied that the antique cast metal Uncle Sam bank which has been in the public domain for many years was utilized as the inspiration for the copyrighted plastic Uncle Sam bank here in issue. Snyder did not, however, merely "copy" the antique work but exercised at least that minimum measure of originality and creativity requisite under the law for a copyrightable work of art.

V. Review of the Minority Opinion

A review of the points made in the Minority Opinion in this appeal would be of value.

The Majority Opinion is fully consistent with and is quite far from doing any damage to this Circuit's line of cases on originality required for copyrightability. Snyder's bank is not a "copy" of anything. It is an artistically designed, carefully sculpted original work. It does not slavishly copy a public domain object, or anything else.

In the present case, there has been a showing of considerably more than an "increment of difference". The significant features which make Snyder's plastic bank clearly distinguishable from its public domain antecedent have been described on pages 6-8 of this Brief.

The Majority did not find sufficient originality in the Snyder bank merely because of the "physical skill" involved in its creation. The Majority did observe:

"that witnesses for both parties conceded that the sculptor needed special skill, training and knowledge, and independent judgment to create the mold. The mold was sculpted independently from scratch, there was no slavish or mechanical copying. With this, the requisite of originality was satisfied." [Emphasis supplied]

The Minority Opinion asserted that the plastic bank did not display "substantial variations" from the metal bank. Snyder has shown that there are indeed "substantial variations"

(ante herein pp. 6-8). The Minority Opinion, moreover, failed to recognize that, as a matter of law, there is no requirement in the Copyright Law and precedents for "substantial variations". (See ante, herein pp. 11-12).

"The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; . . . Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2 Cir. 1951)"

That principle was recognized by the Majority herein:

"Creativity in this context means only that the object created be more than a trivial variation from what existed before."

Although "novelty" is a concept foreign to copyright laws, nonetheless the Majority Opinion inferred a requirement for "a modicum of novelty" from the case law. Even under this test, the variations between Snyder's plastic bank and the metal bank are more than sufficient to satisfy that minimal requirement and provide, at the least, something more than a "merely trivial" variation.

The Minority Opinion asserted that "comparatively small artistic skill and little independent judgment was involved in making the plastic bank." But, this ignores the testimony of both Snyder's and Batlin's expert witnesses. For example, Snyder's expert, Wurmbrand, testified (A-93, li. 10 - A-95, li. 9):

"Q I direct your attention to Plaintiff's Exhibit 1, the metal bank, and ask you to compare it with Plaintiff's Exhibit 2, the plastic bank, and ask you in your opinion what were the steps that were followed, going from the metal bank to the plastic bank?

"A Well, I can guess the steps. But if I were going to make it --

"Q I ask you what you think the steps were that were performed.

"A They went ahead and they made a new model, a new sculpture, reduced in size into new proportions.

"Q You say 'into new proportions'?

"A Right. They changed some of the designs in order to fit plastic. They changed some of the detail work, and from there they proceeded into making the mold.

"Q Must the persons who made this have made a sculpture when they reduced from Plaintiff's Exhibit 1 to Plaintiff's Exhibit 2?

"A The model has to be made by a sculptor. It is not a symmetrical model that you can go by dimension. You have to have the free hand of an artist in order to carve out the detail, even if it is a copy.

"Q Is it your testimony that even if it is an exact copy you must have a model maker, is that correct?

"A Yes.

"Q Could a layman make an exact copy in smaller size?

"A No.

"Q In your opinion, I want your opinion, is Plaintiff's Exhibit 2 an original artistic work compared with Plaintiff's Exhibit 1?

"A It depends what you call original.

"Q Of course it does. What is your definition of an original work?

"A Original -- I would call it an original artistic work, but I wouldn't call it a new design.

"Q It is an original artistic work but not a new design.

"THE COURT: Original artistic simply because it is smaller?

"THE WITNESS: Because it is smaller and because they changed a lot of detail in it which you cannot just take by copying it down and reducing it from a large part to a small part.

"THE COURT: Some of it was done because they were going to use plastic?

"THE WITNESS: Also because of esthetics. Maybe the artist who made the small one decided that he doesn't like this kind of shape and he changed it."

Batlin's expert witness Bloch testified to the same effect at A-64-66. But perhaps even more important, the Majority recognized the fleeting relationship between contemporary taste and artistic work:

"Thus copyrightable works of art often have value for only a short time span, and are useful in a very limited historical and cultural context. (Citations) Consequently, since it is merely a representation of ideas which is protected, and that expression is so time-bound, (in an historical and cultural context), only a very low standard must be satisfied for a work to pass muster with respect to copyrightability."

The Minority Opinion noted that Snyder's skilled artist-creator-sculptor required "a day and a half or two at the most" to create Snyder's plastic bank. To this must be added the time involved in making sketches and in modifying the first clay model in making the prototype. But, time spent cannot be a measure of copyrightability, originality or creativity. Pablo Picasso is reputed to have repeatedly sketched on a napkin in a restaurant for a mere few minutes, and those sketches are highly desirable works of art. Current song

writers and novelists sometimes create their works in a few hours, yet the beauty of their works is widely recognized. Indeed, Abraham Lincoln is reputed to have drafted the Gettysburg Address during a ride on the train and Francis Scott Key wrote our national anthem during a night time shelling of a fort. Copyrightability is determined without reference to time.

The requirement for originality described by the Minority Opinion as a "polestar test" has been examined in Point I of this Brief (ante pp. 9 ,et seq.) The Majority Opinion recognized that authorship refers to the origin or source of a work:

"By originality, the process of the creation is analyzed, and the item is not subject to copyrightability unless it had been constructed by a process requiring independent skill, labor and judgment of an individual."

Footnote 5 to the Minority Opinion is, to use Judge Oakes' words, "hard to fathom". If you count buttons, look at umbrella colors, etc., you find the public domain and Snyder banks have the same features. But, Snyder's original work does not involve selection of any of these features. Instead, it involved taking these features and completely redesigning and sculpting a work having these features. Just as the countless versions of Santa Claus all have his red clothes, fat belly, white beard, etc., any new version independently artistically created should be entitled to copyright (Cf. Doran v. Sunset House Dist. Corp., 197 F.Supp. 940(S.D. Calif. 1961); aff'd., 304 F.2d 251 (9 Cir. 1962), so each newly created, designed and sculpted

Uncle Sam should also be copyrightable.

The statement in the Minority Opinion that there are but three essential variations in the Snyder bank from the metal bank ignores the many differences discussed [ante pp. 6-8] in this Brief. All of these differences are substantial. The fact that all of those differences arose as a result of an independent effort to sculpt a different size work in a new medium does not make those differences any less significant. As the Majority correctly noted, Snyder's sculptor started from scratch and the work involved special skill, training, knowledge and independent judgment. "There was no slavish or mechanical copying."

The Minority Opinion took the Majority to task for supposedly cheapening copyrights and making them meaningless. It is submitted that the Minority view misconceived the purpose of copyright law, misconstrued its objectives and misunderstood the requirement for "originality". The Majority recognized the effort and skill expended in producing the plastic bank, acknowledged the ephemeral and time bound nature of what is and what is not artistic work, and concluded that the plastic bank reflects an independent expression of its author. That analysis by the Majority is consistent with the objectives of the copyright law and the requirement for originality as expressed in the many Opinions cited by the Majority as well as in Alfred Bell & Co. v. Catalda Fine Arts, 191 F. 2d 99 (2nd Cir. 1951), Fred Fisher, Inc. v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924).

Contrary to the statement in the Minority Opinion that the Majority holds the plastic work qualified as a "reproduction" without the necessity of possessing "distinctive features," the Majority addressed itself to the requirements for copyrightability and found that those requirements were satisfied. The Majority noted that a reproduction of a work of art would by definition result in a new work that "reproduced" the old. Recognizing the incongruity of the Minority's view of incremental differences between the finished products, particularly as applied to a reproduction of a work of art, the Majority stated:

"The very idea of 'reproduction' negates, within copyright law, the idea of an increment of difference inherent to the concept of 'nontriviality,' necessary to the creativity element. Peter Pan Fabrics, Inc. v. Dan River Mills Inc., 295 F. Supp. 1366 (S.D.N.Y., 1969), aff'd. 415 F.2d 1067; H. M. Kolbe Co. v. Armgus Textile Co., 184 F. Supp. 423 (S.D.N.Y., 1960), aff'd. 279 F.2d 555 (2d Cir.). That element - creativity - is supplied by the basic underlying work."

Judge Oakes unnecessarily sought a list of things amounting to "creative increment", saying "With no identification of either original or creative increment of variation...". However, the length of such a list is not the test. The test is, has the author made an independent artistic contribution, is he in fact an "author", whereby his work is "original". Snyder more than satisfied this requirement.

The statement in the Minority Opinion that the Majority has given Appellants "total monopolistic protection against all competitors in the plastic medium" once more reflects a misunderstanding of the copyright law. As Mr. Justice Holmes recognized in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249, 250 (1911):

"Others are free to copy the original. They are not free to copy the copy."

See also Judge Learned Hand's opinion in Fisher v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924). Not only has Snyder no monopoly on Uncle Sam, and no monopoly on Uncle Sam in plastic, but he has no monopoly on every Uncle Sam bank. His only copyright monopoly is directed to his expression of such a bank. Batlin or anyone else could have used the metal bank as an inspiration for his own plastic Uncle Sam bank. This case arose because Batlin instead copied Snyder's expression thereof.

The Majority well recognized the very limited rights granted by copyright in contradistinction to patents. Others are free to undertake the process from scratch that Snyder undertook and to derive their own expression of the metal bank.

The analysis of Mazer v. Stein, 347 U.S. 201 (1954) in the Minority Opinion serves to underscore the Minority's insistence upon imposing its standard of artistry and of skill in order to achieve the requirement for "originality." It is apparent that the Minority was simply not satisfied that enough artistry went into Snyder's independent sculpture

of the plastic bank and, therefore, concluded that the plastic bank is not "original". That view is inconsistent with the true meaning of "original," namely that it reflect the author's own independent work.

The Minority Opinion misconstrues the many fabric copyright cases when it says that those copyrights were upheld only "where the design presented is itself unmistakably original." The Minority reads the fabric design cases as requiring that the original design being reproduced itself should be capable of copyright as a "work of art." There is simply no basis in the statutes nor in the case law for such a requirement. However, it should be noted that the original metal Uncle Sam bank was itself the subject of a United States Design Patent. Thus, the original design did reflect acknowledged artistic work.

It is respectfully submitted that the Minority view has confused the concept of originality with concepts which relate more to requirements for the patent grant. The standards imposed by the Majority reflect the true objectives of the copyright law.

VI. The Consequences of this Court's Decision

The Majority Opinion of this Court is a well reasoned document, recognizing and concisely restating the Constitutional purpose of our Copyright Laws. It acknowledges the distinction between the relationship of an "inventor" to his "discovery" and that of an "author" to his "writing."

To adopt the contrary notion proposed by the Minority Opinion of this Court would introduce a highly subjective element into the determination of copyrightability. The Minority would have this Court assert a requirement for an "original idea" to obtain a copyright. Our Founding Fathers did not see fit to establish such a requirement. Congress in its many enactments and revisions in the history of our country never saw fit to establish such a requirement. Such a requirement for an original idea would eviscerate the major distinction between registration for copyright and application for patent.

Copyrights, unlike patents, often pertain to matters of taste - art and sculpture, as well as literature. The Copyright Office has not been charged with responsibility for determinations of whether the "idea" is sufficiently "original" nor is that a matter for the Courts. Otherwise each Jurisdiction, each Court, each Judge would be called on to decide whether a work of art, or a reproduction of a work of art is sufficiently novel. The Courtroom is not an appropriate forum to measure matters of taste. In the words of Mr. Justice Holmes:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value - it would be bold to say that they have not an aesthetic and educational value - and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See Henderson v. Tomkins, 50 Fed. Rep. 758, 765. We are of the opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law. Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 251 (1903).

To confirm the decision of the Majority would let the law stand as it has been without damage to society, to the public interest and, indeed, with but inconvenience to those who stand in the plaintiff's shoes in this case. For to permit this copyright to stand does not preclude plaintiff from making and selling his own version of the metal Uncle Sam Bank in the public domain. Once more, to quote Mr. Justice Holmes:

Others are free to copy the original. They are not free to copy the copy.
Bleistein v. Donaldson Lithographing Co. at p. 249, 250.

Conclusion

The Majority Decision of this Court, reversing the Court below, properly applied the Copyright Law to the facts herein, and should be confirmed.

Respectfully submitted,

New York, New York
December 29, 1975

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A 202 Affidavit of Personal Service of Papers
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

L. BATLIN & SON INC.,
Plaintiff- Appellee,

Index No.

- against -

JEFFREY SNYDER and ETNA PRODUCTS CO, INC.,
Defendants- Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James A. Steele

being duly sworn.

depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the 29th day of Dec. 1975 at 521 PFifth Avenue, New York, New York

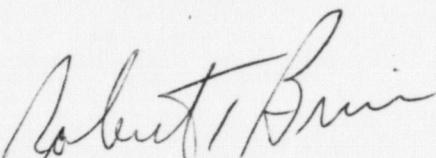
deponent served the annexed Brief

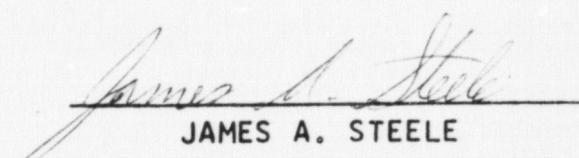
upon

JACOBS & JAXXXX JACOBS P.C.

the Attorneys in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.

Sworn to before me, this 29th
day of December 1975


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977.


JAMES A. STEELE